

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Permit
Application No. 2001-1036 to
William C. Young.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

This matter came on for hearing on August 21, 2002 before Administrative Law Judge (ALJ) Kenneth A. Nickolai, in Walker, Minnesota. The record closed on that date at the end of the hearing.

Appearing on behalf of the Department of Natural Resources (DNR) was Assistant Attorney General Greg Schaefer, 900 NCL Tower, 445 Minnesota Street, Saint Paul, Minnesota 55101-2127.^[1] Paul Phelps, 1811 Weir Drive, Suite 275, Woodbury, MN 55125 appeared on behalf of William C. Young (Young or Appellant).

NOTICE

This report is a recommendation, **not** a final decision. The Commissioner of Natural Resources will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions and Recommendations contained herein. Pursuant to Minn. Stat. §14.61, the final decision of the Commissioner of Natural Resources shall not be made until this report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by the Report to file exceptions and present argument to the Commissioner of Natural Resources. Parties should contact Allen Garber, Commissioner of Natural Resources, 500 Lafayette Road, St. Paul, Minnesota 55155-4040, telephone 651-296-2549, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

Whether Appellant is entitled to a DNR permit authorizing 1) the installation of a covering for two boat slips consisting of a shingled or other hard surface supported by roof trusses and framing placed on posts and attached to piers driven into the bed of Leech Lake, but designed to be removable; and 2) the excavation of material from the harbor to accommodate a larger watercraft.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Appellant has owned the property described as the South 165 feet of the North 330 feet of Government Lot 2, Section 14, Township 143 North, Range 29 West, Cass County, Minnesota since June, 1994. That property has 165 feet of frontage on Leech Lake, including a harbor.

2. The harbor currently accommodates four boats. Appellant's land extends around the harbor to the lakeside, leaving an access width of approximately 21 feet.^[2] The harborage contains approximately 4,230 square feet. The harbor contains narrow dockage resting on piles along the shoreline and metal legs extending down to the lakebed.^[3] A single dock resting on piles divides Young's end of the harbor into two boat slips.^[4] At the opposite end of the harbor, Appellant's neighbor has dockage creating two boat slips. Riprap was placed on the land to the lakeside of the harbor to prevent erosion and provide additional protection for boats in the harbor.

3. In June 1996, Appellant Young made a proposal to the DNR for adding a cover for his boat slips. The DNR noted that the location of the structure would be within the 75-foot setback zone from the shoreline of Leech Lake, thereby precluding the issuance of a permit. The DNR noted, however, that a temporary structure could be installed without a permit.^[5]

4. Young constructed the shelter according to his original plans in the Fall of 1996. He did not obtain a permit for this construction from either the DNR or from Cass County. The shelter was described as follows:

The boat shelter was about 20 by 30 feet. It had fourteen timbers embedded in the ground outside the harbor pilings. Atop the timbers were crosspieces upon which fifteen manufactured roof trusses were placed and braced. The trusses, constructed of 2x4 lumber, along with other framing, supported plywood sheathing that was shingled to form the covering for the boat shelter. The structure was built by two carpenters in the same manner as a typical roof is built on a large garage or small house. The area under the trusses was enclosed by a ceiling made of siding panels. Electricity was provided to the boat shelter through seven outlets by conduits running up into the ceiling along one of the timbers and down from the ceiling along six other timbers. Light fixtures were installed in the ceiling. Floodlights were installed on the gable end overlooking the harbor. The entire boat shelter weighed approximately 3,000 pounds. The construction was located approximately 25 feet from the shoreline of Leech Lake. The closest edge was about 25 feet from the ordinary high water level (OHWL) and the farthest edge was about 50 feet.^[6]

5. In June 1997, Appellant was issued a misdemeanor citation for building the boat shelter without a permit. The citation was for violations of the Cass County Ordinance for the Management of Shoreland Areas ("Shoreland Ordinance"). Subsequently, the DNR issued a correction order to Appellant requiring removal of the

boat shelter based on the DNR's rules. Appellant was convicted of the misdemeanor violations of the Shoreland Ordinance.^[7]

6. On November 20, 1998, Applicant completed a permit application for construction of a "canopy" over the harbor. The only difference between the shelter that had been built and taken down and the structure described in the application was the use of brackets attached to some of the pilings in the harbor. The brackets were designed to hold the upright posts supporting the roof approximately one foot over the ground. The DNR granted a limited permit, which stated:

This permit authorizes the installation of three existing permanent docks having a length of approximately 30 feet, which were constructed within an existing boat harbor for the mooring of two boats. This permit does not authorize the existing permanent trussed roof within the harbor regardless of whether it is covered with shingles, lightweight metal, or other materials; nor does it authorize the installation of permanent pilings to support a roof or canopy.^[8]

7. The cover letter transmitting the limited permit included the explanation of how the Cass County Shoreland Ordinance prohibited the sort of structure proposed by Applicant. The DNR described the characteristics of an allowable temporary canopy as follows:

It may be possible to construct a canopy in or over the inland harbor if it is temporary in nature; meaning the canopy must be designed and constructed so that it may be removed from the harbor on a seasonal basis, and all components of the canopy and support structure must be capable of removal by nonmechanized means. Such a canopy, because it is temporary in nature, would not require a protected waters permit.^[9]

8. Young appealed the limitation of the permit as it regards the limitation on the roof or canopy. A contested case proceeding was held, including a hearing. The ALJ in that matter recommended denial of Applicants proposed modifications regarding a roof.^[10] The final order from the Commissioner affirmed the ALJ recommendation.^[11]

9. On August 10, 2000, Applicant requested a permit to "construct boathouse - dock, excavate 29' x 87'..." and perform maintenance on the harbor where it has filled in and deepen it to 5' to 6' overall.^[12] Applicant sought authority to excavate a substantial inlet from the harbor, terminating in two additional boat slips, including one to provide storage and docking for a 36-foot boat he wishes to purchase. The permit request did not provide details of the type of construction or materials to be used when building the proposed structure for protecting boats.

10. Due to the ongoing appeal of the prior permit application, the DNR did not address the new application until April 2001.^[13]

11. On May 22, 2001, the DNR denied the August 10, 2000 application in all respects.^[14] The reasons for denial of the shelter portion of the application were not

stated in the letter. The excavation provisions of the application were described as beyond the guidelines for safe maneuvering of a 34-foot boat, since the harbor currently has an area of 4,230 square feet.^[15]

12. On June 21, 2001, Applicant appealed the denial.^[16] On June 26, 2002 Deputy Commissioner Steve Morse issued the Notice and Order for Hearing in this matter, setting the hearing for August 21, 2002 in the Commissioner's Board Room of the Cass County Courthouse. On July 11 and 18, 2002, the Notice was published in the Walker, Minnesota *Pilot-Independent*.^[17]

13. The modifications proposed by the Applicant to the previously constructed boat shelter included connecting the upright supports at their bases with a tubular steel frame that was designed to accept wheels. When in place, the wheels would be removed and the uprights attached to the piers surrounding the slips with lag bolts. To remove the shelter from over the slips, the upright supports would be detached from the piers, and jacked up, the wheels attached, and the shelter pulled back from the slips with a winch.^[18] Due to the orientation of the boat slips being parallel to the shoreline, the mobile boat shelter would remain the same distance from the shoreline whether it was over the harbor or retracted.

14. The permit application requested sufficient harbor excavation to accommodate a 36-foot boat. Applicant intends to buy a 36-foot boat but whether he actually makes the purchase depends on having the ability to safely maneuver the boat in his harbor. Ex. JJ, the animation of a 38-foot boat moving in the existing harbor, was not given to DNR before the hearing. The animation showed a smaller boat occupying the easternmost (shoreward) boat slip at Young's end of the harbor.

15. DNR rules provide for one mooring space per riparian lot. The DNR rules on the alteration of cross-sections of public waters includes placement of fill to offset an excavation such as that proposed by the Applicant. The area that the Applicant seeks to excavate is significantly larger than what can be filled in without completely filling in the existing boat slips.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.40, 103G.245, and 103G.251.

2. Notice of the hearing was timely given, and all other relevant substantive and procedural requirements of law or rule have been fulfilled. Therefore, the matter is properly before the Administrative Law Judge.

3. When attached to piers in the harbor, the proposed boat shelter is a structure placed in public waters within the meaning of Minn. Rule 6115.0170, subp. 37.

4. Both permanent and temporary structures placed in public waters are prohibited from having a roof by Minn. Rule 6115.0210, subp. 3.D.

5. The top portion of the proposed boat shelter is a roof within the meaning of Minn. Rule 6115.0210, subp. 3.D.

6. Rendering the boat shelter mobile does not change the nature of the structure for purposes of Minn. Rule 6115.0210, subp. 3.D. The proposed temporary structure is designed with a roof and so is prohibited.

7. Minnesota Rule 6115.0210, subp. 5, items C and E, require that any permit issued by the DNR be consistent with the applicable Shoreland Ordinance for the construction location.

8. The intended location for the proposed boat shelter is within the structure setback area set by the Shoreland Ordinance.

9. The intended location for the proposed boat shelter is inconsistent with the applicable Shoreland Ordinance and therefore fails to meet the standards that must be met before the DNR can issue a permit.

10. The proposed excavation is located within a harbor and is governed by Minn. Rule 6115.0200, subp. 5, item K. That rule limits excavations to provide a single mooring space for each riparian lot. Applicant's property consists of one riparian lot, within the meaning of the rule.

11. Applicant currently has two mooring spaces serving his riparian lot. Those mooring spaces would remain under the excavation permit proposed by Applicant. Applicant has not met the standards of Minn. Rule 6115.0200, subp. 5, item K, to obtain any additional mooring spaces through the proposed excavation.

12. Minn. Rule 6115.0200, subp. 5, items C and D, require that any permit for an excavation authorize only the "minimum impact" solution to a specific need" and "minimum dimensions necessary for achieving the desired purpose.

13. Applicant has not demonstrated that the proposed excavation is the minimum impact solution to his need for mooring a larger boat in his harbor. Denial of an excavation permit until Applicant demonstrates that the proposed work complies with the applicable rule provisions is in the public interest.

14. Any of the Findings of Fact more properly designated as Conclusions are hereby adopted as such.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the DENIAL of the application for permit submitted by William C. Young be AFFIRMED.

Dated: November 6, 2002.

/s/ Kenneth A. Nickolai

KENNETH A. NICKOLAI

Chief Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Department is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail.

Reported: Taped – Five Cassettes.
No Transcript Prepared.

MEMORANDUM

This contested case raises similar issues to one decided for these two parties in 2000. Applicant has made modifications to the design of a boat shelter that was previously determined to be a prohibited roof over public waters. The matter to be decided here is the whether adding wheels to make the structure temporary makes its installation permissible under the applicable rules. Applicant has also raised a second issue by requesting a permit to excavate an 87-foot by 29-foot space in the harborage to provide mooring for a 36-foot boat that the Applicant seeks to purchase. Each issue will be addressed individually.

DNR Jurisdiction

The DNR's rules governing work in public waters relating to structures were discussed in the prior proceeding. The DNR's jurisdiction begins at the ordinary high water line (OHWL) of a body of water and runs waterward. The placement of structures in public waters is governed by Minn. Rule Chap. 6115. "Structure" is defined for the purposes of that chapter as:

Subp. 37. **Structure.** "Structure" means any building, footing, foundation, slab, roof, boathouse, deck, wall, or any other object extending over, anchored, or permanently attached to the bed or bank of a protected water.^{[\[19\]](#)}

Subp. 40. **Temporary Structure.** “Temporary structure” means any dock, floating structure, watercraft lift, watercraft canopy, or other structure that can be removed from public waters by skidding intact or by disassembly with hand tools. [\[20\]](#)

The boat shelter proposed by Applicant would be attached by lag bolts to piers driven into the bed of the harbor. Wheels could be attached to the uprights and the entire structure moved with a winch or a pick up truck. Applicant maintains that the structure is temporary and therefore does not render the boat shelter to be a “structure” within the meaning of the rule.

In the prior contested case, Applicant made the identical argument with a bracket system attaching the upright supports to the piers. The lag bolt proposal is at least as permanent a connection as the bracket system. Either means of connection is sufficiently permanent to render the boat shelter to be “permanently attached to the bed of a protected water.” In addition, the placement of the boat shelter would necessarily make it an “object extending over ... the bed or bank of a protected water.” The proposed boat shelter is within the DNR’s jurisdiction.

Even if the structure were temporary, since it is possible to jack up the supports, attach wheels and pull it back, it continues to have a ‘roof’ within the meaning of Minn. Rule 6115.0170, subp. 37. Minn. Rule 6115.0210, subp. 3, contains a number of express prohibitions against structures to be placed in or on public waters. The subpart states, in pertinent part:

Subp. 3. **Prohibited placement of structures.** Placement of structures, temporary structures, and floating structures is prohibited when the structure, temporary structure, or floating structure:

* * *

D. Is designed or intended to include walls, a roof, or sewage facilities.

The boat shelter was found to have a roof in the prior contested case proceeding. The ALJ in that matter analyzed the issue to be decided as follows:

The DNR has interpreted "roof" to mean permanent structures, particularly when supported by trusses. Lightweight structures, particularly those comprised of tubular metal and canvas, are deemed "seasonal" by the DNR. Whether Appellant's permit should be granted depends upon whether the structure has a prohibited roof or a permissible seasonal covering.

In the prior matter, the parties argued as to whether using hand tools for removal rendered the structure a canopy not subject to the permit requirement. Similarly, Applicant argued that seasonal canopies are retained throughout the year, thus rendered the distinction between permanent and seasonal to be meaningless. The ALJ in the prior contested case analyzed the issue as follows:

A structure that is durable and that would cost several thousand dollars to remove is not a temporary structure. The construction methods and materials used to erect the boat shelter are indistinguishable from those used in houses, garages, and other permanent buildings. Appellant has already maintained that removal of the boat shelter portion of the structure works a "substantial hardship." The fact that such a durable structure can be deconstructed with hand tools is irrelevant to whether the structure's nature is permanent or temporary. Appellant's boat shelter as originally constructed has a permanent roof and is therefore prohibited by Minn. Rule 6115.0210, subp. 3.D.

Applicant has proposed a modification to the design of the boat shelter to avoid the cost of removal factor. The modification is adding wheels to the boat shelter, thereby allowing it to be winched away from the boat slips without the use of mechanized means. While adding wheels makes the boat shelter mobile to a limited degree, that change does not alter the durability or permanence of the roof.^[21] In addition, Applicant maintained that a covering is not a roof, if the structure has no walls. This interpretation is contradicted by the plain language of the applicable DNR rule. The proposed boat shelter contained a roof in the first proposal and nothing in the Applicants proposal here has changed the fundamental nature of that structure. The proposed boat shelter has a roof and therefore is prohibited from extending over public waters by Minn. Rule 6115.0210, subp. 3.D.

VersaTube Building System and Big Top Portable Fabric Structures Proposals

At the hearing on this matter, Appellant introduced evidence regarding the VersaTube building system, suggesting that this means of boat covering constituted a temporary canopy for which no permit was required. Applicant also introduced evidence regarding fabric-covered structures by Big Top Manufacturing to support this argument. The DNR suggested that neither structure constituted an exempt canopy, since the each erected structure was more elaborate and durable than is expected of a canopy.

The ALJ in the prior matter discussed the use of alternative materials to form the covering of the boat shelter. In finding that lighter materials did not render the boat shelter a canopy, the ALJ stated:

The underlying structure would remain the same, with 15 trusses, a ceiling, and 12 upright supports. Appellant maintains that the boat shelter, while remaining "a covering, it is not really a 'roof'." The resulting structure would be "durable to the elements" The DNR responded that the metal sheets would be as permanently attached as the shingles and plywood of the original boat shelter.

In addition to the fact that the boat shelter looks nice and matches his cabin, one benefit Appellant derives from the design of sturdy upright supports, 15 trusses, a ceiling, and rigid roofing material is durability. The proposed boat shelter is designed to provide many years of use without replacement. This durability in design is exactly what renders the proposed boat shelter a permanent structure with a roof, rather than a seasonal canopy. Thus, it is prohibited by Minn. Rule 6115.0210, subp. 3.D.

The “Fast and Simple Frame Assembly” for the VersaTube building system shows a structure with “Roof & Wall Trusses” and trusses along the centerline of the structure.^[22] The resulting building is described as providing “exceptional strength and rust resistance.”^[23]

The VersaTube building system results in a structure similar in description to a boathouse in another contested case proceeding. In that matter, the structure was lightweight, sufficiently so to be installed on a floating dock. The structure in that matter was described as a “boathouse” that:

... measures 12 feet long by 7 feet wide with walls approximately 7 feet high and a roof. It has no floor, but is secured to the platform by bolts.^[24]

In that contested case proceeding, the floating dock was found to be temporary, but the riparian landowner was required to remove the boathouse. The ALJ in that matter described the reason for that result as follows:

While the structure is not exceptionally large, or designed to be used as a human habitation, the structure does have walls and a roof. The structure is used to house jet skis, which are watercraft. The structure is also used to store tools for work on the *Dolphin* [a three-masted barquentine]. These uses of the structure place it within the description of boathouse as that term is used in the rule.

The structure falls under both the prohibitions against boathouses and structures that include walls and a roof. The reasons for prohibiting boathouses are reasonable, since allowing such structures would have a dramatically detrimental impact on the visual experience of persons using public waters. Since such structures are very useful to riparian owners, there would be a large number of such structures to deal with, absent a total ban.^[25]

While the particular application of the VersaTube building system on Applicant’s property would lack walls, there is no meaningful difference between his proposed structure and the prohibited boathouse in **Rossow**. Each structure has a roof and roofs are prohibited.

A closer question is posed by the fabric-covered structures from Big Top Manufacturing. The evidence presented by Applicant indicates that such structures are

large and durable. The pictures of such structures shows that they are maintained in all seasons, and described as “All Weather Structures.”^[26] The largest of such structures is designed to emulate a Quonset hut, supported by arched trusses, and anchored using large concrete pillars.^[27] While the Big Top Manufacturing structures are smaller, the manufacturer described the vinyl covering as lasting “12+ years” under normal usage and the steel trusses as lasting “indefinitely.”^[28]

The design of these all-weather structures includes the fabric forming the functional equivalent of a roof and walls. The durability of these structures promotes their use in all seasons. These structures do not fall within the exemption for seasonal, temporary canopies.

Other Structures

As in the first contested case proceeding, Applicant maintains that the DNR has inconsistently applied its standards regarding structures built on Leech Lake. That issue was decided against Applicant in the first proceeding and the discussion will not be repeated here.

Proposed Excavation

A DNR permit is required for excavation from public water. Such a permit must meet the standards of Minn. Rule 6115.0200, subp. 5, which states, in pertinent part:

Subp. 5. **Permits required.** Permits shall be required for the excavation and removal of any materials from protected waters or any excavations extending into or out of protected waters, except as provided in subparts 3 and 4, and shall be subject to the following general criteria:

* * *

C. The proposed project must represent the "minimal impact" solution to a specific need with respect to all other reasonable alternatives.

D. The excavation must be limited to the minimum dimensions necessary for achieving the desired purpose.

Applicant relies upon the animation showing how a 38-foot boat would have to maneuver in order to occupy the lakeward slip in Applicant's end of the harbor.^[29] This animation shows that docking the 36-foot boat may require some back and forth maneuvering in order to occupy that slip, and some similar maneuvering to exit the slip and the harbor onto Leech Lake.^[30] The animation shows that entering the harbor and berthing at the proposed new slip would be easier, requiring only a minimal adjustment to the course of the boat.

The situation changes, however, when the boat is to leave the proposed new slip. The boat must be backed out into the harbor and turned 180 degrees to exit the harbor by the bow. By contrast, the exit from the lakeward slip requires only a 90-

degree turn, occupying no more of the harbor, to accomplish the same maneuver. The animation assumes that the shoreward slip is occupied by a 25-foot boat. There is no analysis in the record of how the 36-foot boat would maneuver if the shoreward slip were unoccupied.

The animation also makes a further assumption, that the mouth of existing slips cannot be modified. On its face, the evidence presented by the Applicant shows that a much smaller excavation in the area of the shoreward slip could provide adequate access for the 36-foot boat that the Applicant seeks to purchase. The excavation of a smaller area complies with the rule requirements of minimizing the impact of the project and being the minimum dimension necessary to provide access to the boat.

Applicant bears the burden of showing that the proposed work complies with Minn. Rule 6115.0200, subp. 5. More analysis is required of the evidence offered to support the proposed excavation, particularly with respect to alternatives, before the DNR can be required to issue a permit for the proposed excavation. The evidence relied upon by the Applicant, on its face, fails to meet the Applicant's burden. Therefore, no DNR permit can be issued for the structure.

Conclusion

For the foregoing reasons, the denial of the permit should be affirmed in all respects.

K.A.N.

^[1] After the hearing, a substitution of counsel was received that identified Matthew B. Seltzer as counsel for the DNR.

^[2] Exhibit JJ (Harbor Animation).

^[3] Exhibit 18.

^[4] Exhibit JJ (Harbor Animation).

^[5] Exhibit 4, Commissioner's Findings of Fact, Finding 8.

^[6] ***ITMO Limited Permit No. 99-1094 to William C. Young***, OAH Docket No. 12-2000-12817-2, Finding 4 (Recommendation issued August 11, 2000)(contained in the record as Exhibit 5).

^[7] Exhibit 3.

^[8] ***ITMO Limited Permit No. 99-1094 to William C. Young***, *supra*, Finding 12 (emphasis in original).

^[9] Exhibit R.

^[10] ***ITMO Limited Permit No. 99-1094 to William C. Young***, *supra*.

^[11] ***ITMO Limited Permit No. 99-1094 to William C. Young***, *supra*, (Commissioner's Order issued February 22, 2001)(contained in the record as Exhibit 6).

^[12] Ex. 1.

^[13] Exhibit O.

^[14] Exhibit P, Exhibit 2.

^[15] Exhibit P.

^[16] Exhibit RR.

^[17] *Id.*

^[18] Exhibits A and JJ, (Mobile Slip Roof Animation).

^[19] Minn. Rule 6115.0170, subp. 37.

^[20] Minn. Rule 6115.0170, subp. 40.

^[21] The boat shelter will remain within 75 feet of the OHWL in its constructed state when it is moved, thereby potentially triggering the Shoreland Ordinance, even if the boat shelter was allowable under the DNR's rules.

^[22] Exhibit B.

^[23] *Id.*

^[24] ***In the Matter of the Alteration of a Cross-Section of the St. Croix River by Lee and Genevieve Rossow Without a Permit from the Commissioner of Natural Resources***, OAH Docket No. 7-2000-12019-2 (ALJ Recommendation issued May 7, 1999), *aff'd* (Commissioner's Order issued January 19, 2000).

^[25] **Rossow**, at 7-8.

^[26] Exhibit LL.

^[27] Exhibit H.

^[28] Exhibit E.

^[29] The use of the 38-foot boat in the animation is intended to account for spars and other equipment attached outside the hull.

^[30] Exhibit JJ (Harbor Animation).